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MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

STATE OF MONTANA, Plaintiff, vs. ROBERT S. MOUNT, Defendant.	Cause No. DC-00-255 Dept. No. 3 RESPONSE TO STATE MOTIONS IN LIMINE AND REQUEST FOR HEARING

GENERAL RESPONSE: I

The defense motions in limine fall generally into two categories: (1) routine motions designed formally to confirm exclusion of patently inadmissible evidence (e.g. prior pleas, prior conviction, present custody status, etc.); (2) proffers of defense evidence which, because of statute or court order, appear to require advance approval for admission (e.g. evidence of complainant's prior recent promiscuity [Section 45-5-511(2) MCA]; evidence of complainant's crimes and numerous other transactions with law enforcement [Court Protective Order, 12/19/01]. A few of the State's motions in limine fall into the first category above. Most of the State's motions, however, seek to exclude detailed trial evidence which even by general description is obviously relevant, and seek to exclude it before it is even offered in context in the actual trial. This is inappropriate, as it requires the Court: (1) to guess at context; (2) to speculate as to the actual details of the evidence; (3) to make abstract rulings without any familiarity with how the

actual details fit into the overall fabric of the case. This is especially inappropriate, in that some of the evidence apparently sought for exclusion is critical to the defense case and has probative value centrally bearing on the issues in the case, and the exclusion of which would thus contravene due process of law as guaranteed by the U.S. and Montana Constitutions. The defendant's most basic right is the right to offer evidence to defend against the elements of the charge. This right at the very least militates in favor of reserving ruling on the bulk of the State's motions until the evidence is actually offered at trial.

GENERAL RESPONSE: II

Many if not most of the State's motions in limine are based on a strange reading of the Montana Rules of Evidence respecting so-called "character evidence." The State repeatedly in its motions seeks to have the Court rule in advance that defendant may not introduce so-called "character evidence" for any purpose other than to impeach the complainant regarding her "truthfulness." Impeachment for truthfulness is, indeed, one use of character evidence provided for in the Rules (Rule 608)--but hardly the exclusive or most important use. Nearly all the so-called "character" evidence the defense proposes to use and the State wishes to exclude is prima facie admissible under the following Rules of Evidence:

(1) M.R. Ev. 404(a)(2) which provides that "a trait of character is not admissible for the purposes of proving action in conformity therewith except: evidence of a pertinent trait of character of the victim of the crime offered by an accused..."

(2) M.R. Ev. 404(c) which provides that: "evidence of a person's character or a trait of character is admissible in cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense."

(3) Bias or motive impeachment, specifically incorporated in the Rules

of Evidence by U.S. v. Abel, 469 U.S. 45 (1984), State v. Milton, 930 P.2d 28,30 (Mont. 1996). Much of the bias and motive evidence the defense will introduce is not even character evidence; rather, it is evidence of specific circumstances existing in complainant's (or others') life which create the bias or motive. Where such evidence could be construed as referring to a trait of character, it is clearly admissible (like the circumstantial evidence) if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," M.R. Ev. Rule 401.

(4) Evidence that is not character evidence at all, but that refers to habit (M.R. Ev. Rule 406), or circumstances, conduct, or statements which relate directly to what happened on May 24, 2000 ("what happened" includes, of course, what happened in the minds of the participants, when relevant), and is thus admissible under M.R. Ev. Rule 402.

RESPONSE TO STATE MOTIONS IN LIMINE SERVED MONDAY, 1/7/01, 5:00 P.M.

The most outrageous motion in limine offered by the State is the last one filed, which seeks to prohibit the defendant "from alleging that the victim behaved in a flirtatious or sexually suggestive manner toward defendant." This motion is without merit in the first instance because, if granted, it would have the patently unconstitutional result of depriving the defendant of his fundamental right (U.S. Constitution Amendment V, Montana Constitution, Article II, Section 24) personally to testify in his own defense. Obviously, it does no good for a defendant to sit physically on the stand if he cannot offer evidence of what occurred during the incident in question, or describe other circumstances (the only circumstances) bearing directly on his innocence of the crime.

However, there are some more particular reasons the State's motion is without merit. The first is that part of the evidence described ("flirtatious or sexually suggestive conduct of the victim toward the defendant")--that part that occurred on May 24, 2000--is directly protected for admissibility by the Montana transaction rule [Section 26-1-103 MCA (formerly called the "res gestae" rule)]. The second is that all the flirtatious and sexually suggestive conduct of the complaining witness toward the defendant which occurred in the few weeks prior to May 24, 2000, is admissible under State v. Detonancour, 2001 MT 213.

The transaction rule provides that "where the declaration, act, or omission forms part of a transaction which is itself the fact in dispute or evidence of that fact, such declaration, act, or omission is evidence as part of the transaction" Section 26-1-103 MCA. Admissibility under the transaction rule is "predicated on the jury's right to hear what transpired immediately prior and subsequent to the commission of the offense charged, so that they may evaluate the evidence in the context in which the...act occurred," State v. Wing, 870 P.2d 1368 (Mont. 1994). Obviously, this rule compels the admissibility of evidence relating to everything that occurred at 330 Tremont between defendant and complainant between 4:00-7:00 a.m., May 24, 2000.

Secondly, as to evidence of "flirtatious or sexually suggestive conduct of complainant toward defendant" which occurred in the weeks immediately preceding May 24, 2000, the recent Detonancour case makes clear that all this evidence is admissible under routine rules of relevancy. The holding in Detonancour (as distinct from the dicta), is that "flirtatious and sexually suggestive behavior" is "simply not sexual conduct as contemplated by the [rape shield] statute," 2001 MT 214, Para. 23, 25. Thus, such conduct is not in any way affected by the provisions of the rape shield statute, and is admissible under

normal rules of relevancy. Evidence of such conduct is (to say the least) relevant--critically relevant, weightily relevant--to the central issue in this trial, namely whether defendant "knowingly had sexual intercourse (or contact) without consent." If he did not know the contact was without consent, he did not commit a crime. The only way persons form reasonable judgments about others' consent or lack of consent is by their conduct, the outward manifestations of their inner states of mind. The only evidence in a case like this, relevant to whether a sexual transaction took place with or without consent is (1) what the complainant thought and (2) what the defendant thought about consent; and normally what the defendant thought about consent (if he acted in good faith), is determined by the conduct of the complainant, the outward behavior of a person that everyone always has to rely on to give them a clue as to what someone desires or doesn't desire. In the sexual sphere, particularly, communication is often nonverbal and ambiguous, and nuance does play a key role in perception.

These are all truisms, but defendant is compelled to state the obvious by the State's motion to exclude the very testimony that is central to a fair evaluation of guilt or innocence to the charge--which motion should be summarily denied.

The State has also made a motion to allow the complaining witness and her mother to be present "at all stages of the trial," even though both are witnesses. This is problematic for several reasons. The complaining witness is a key witness and must be excluded from all proceedings until she testifies. She is a proven liar and manipulator and cannot be permitted to fashion her trial testimony by what she hears at voir dire, opening statement, from police witnesses, etc. In fact, she should be under a very specific sequestration order permitting no discussion with anyone about the content of any court proceedings until she testifies. Contrary to how she and the State are comporting themselves,

she is not a formal party to these proceedings.

If the presence of Ms. Haley, Ms. Mount, and/or a "crime victims advocate" is permitted after Ms. Haley testifies, it should be under a protective order strictly prohibiting each and all of them from engaging in the usual emotional theatrics displayed in such situations specifically designed and enacted in an attempt to influence the jury to convict defendant based on passion and prejudice.

OTHER STATE MOTIONS IN LIMINE

The State moved on 1/4/02 to prohibit defendant from offering evidence that Ms. Haley has gang affiliations. The defense objects; testimony to that effect is necessary to explain the res gestae (events occurring between 6:55 - 7:05 a.m. on 5/24/00), hence is admissible under the transaction rule (Section 26-1-103 MCA).

The State on January 2, 2002, moved to prohibit defendant from implying Ms. Haley was given a reduced charge without first making a showing those agreements were made in relation to her testimony in this case. The defense objects. First, there is evidence of favored treatment by the State not having to do with reduced charges (e.g. ignoring probation violations, countenancing open under age alcohol violations, not enforcing warrants, etc.). Second, Ms. Haley's perceptions in this regard are crucial; whatever the State intends, Ms. Haley believes (and not unreasonably) that her official status as a "victim" is likely to be of use to her in her continual attempts to extricate herself from her myriad difficulties with the law.

RESPECTFULLY SUBMITTED this 8th day of January, 2002.

Defense Counsel